Supreme Court, U.S.
FILED

No. _____ 041359 APR 8 2005

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In The

Supreme Court of the United States

MARTINGALE, LLC.,

Petitioner,

v.

THE CITY OF LOUISVILLE;
WATERFRONT DEVELOPMENT CORPORATION;
BRIDGE THE GAP, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The Commonwealth Of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether in a collateral state condemnation proceeding, a state court may adjudicate abandonment or order condemnation of a railroad/bridge franchise granted by the United States without the United States' consent.

RULE 29.6 STATEMENT

The Petitioner has no parent companies nor does any publicly held company own any of its ownership interests.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Kentucky Supreme Court dated January 12, 2005 denying discretionary review in this case is unreported but appears in the appendix to this Petition at App. page 1.

The decision of the Kentucky Court of Appeals denying rehearing is not reported but is dated August 10, 2004. It appears in the appendix to this Petition at App. page 2.

The decision of the Kentucky Court of Appeals is reported at 151 S.W. 3d 829 and is dated July 9, 2004. It appears in the appendix to this Petition beginning at App. page 3.

The Trial Court decision of the Jefferson Circuit Court in this case is dated December 11, 2002 and is not reported. That decision along with the Circuit Court's interlocutory order is reprinted in the appendix to this Petition beginning at App. page 13.

Also appearing in the appendix to this Petition beginning at App. page 22 is a related unreported decision of the United States District Court for the Western District of Kentucky dated June 5, 2002.

The decision of the appeal from the District Court decision to the United States Court of Appeal for the Sixth Circuit is dated March 17, 2004 and reported at 361 F. 3d 297. The Sixth Circuit decision appears in the appendix to this Petition beginning at App. page 33.

In addition, this Court's denial of the Petition for Certiorari as a result of the Sixth Circuit decision is dated November 1, 2004, is reported at ___ U.S. ___, 125 S. Ct.

453 and appears in the appendix to this Petition at App. page 46.

JURISDICTION

Jurisdiction of this case is proper pursuant to 28 U.S.C. section 1257 as this is a Petition for Certiorari from a final decision of the Court of Appeals of the Commonwealth of Kentucky. That decision became final when the Kentucky Supreme Court denied Petitioner's Motion for Discretionary Review on January 12, 2005.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States . . . shall be the Supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2.

This case involves rights granted under the Act of December 17, 1872, Chapter IV, 17 Stat. 398 which provides for construction of bridges over the Ohio River below the Covington and Cincinnati railroad. App. page 47. The "Big Four Bridge" which is in question here is located at Louisville, Kentucky, approximately 100 miles below the Covington and Cincinnati railroad.

This case also involves rights confirmed by an Act of Congress dated May 3, 1899 and appearing at 33 U.S.C. section 401. This Act approves of any bridges which had

previously been built with the approval of the Secretary of War. The Big Four Bridge at issue here is such a bridge.

In addition, this case may involve 49 U.S.C. section 10905 (1984) and 49 U.S.C. section 10501 relating to the exclusive jurisdiction of the federal Surface Transportation Board over railway lines.

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On July 27, 2001, the City of Louisville filed an action seeking to condemn the rights of the Petitioner, Martingale, LLC and Bridge the Gap, Inc. in the Big Four Bridge. After a new deck is placed on the Bridge, Louisville seeks to use the Bridge as a pedestrian walkway across the Ohio River from a park located on the Kentucky side. Martingale and Bridge the Gap moved to dismiss the condemnation action in part because the State Court did not have the authority to order condemnation of rights granted by the United States government in the Bridge.

The Trial Court held that the City of Louisville indeed had the right to condemn the Bridge even though it was associated with an interstate franchise granted by the federal government. App. at page 17.

On July 9, 2004, the Kentucky Court of Appeals affirmed the Trial Court's decision. The Court of Appeal's decision was made in the face of the argument that "Martingale possesses certain franchises granted by the United States . . . and . . . the city lacks the authority to condemn these franchises." App. at page 6. The Kentucky Court of Appeals squarely held, however, that the City of Louisville

had the right to condemn a federal franchise because the existence of a federal franchise only affected the value of the Bridge not whether the City had the legal right to condemn the Bridge: "Therefore, the existence of a state or federal franchise would only affect the condemnation action to the extent that the City would be required to pay the reasonable value of the franchise taken." App. at page 7.

The Court of Appeals also held that Martingale "does not possess a valuable franchise from any government, state or federal, because Martingale's predecessor petitioned the Interstate Commerce Commission to be allowed to abandon the Bridge." Moreover, according to the Court of Appeals, as a matter of fact, the Bridge was abandoned because of its lack of physical access. App. at page 7. In support of this latter conclusion, the Court of Appeals relied upon the decision of the United States District Court for the Western District of Kentucky in a related federal action. App. at pages 7-8 n.9.

Martingale moved to reconsider the Kentucky Court of Appeals' reliance upon the U.S. District Courts findings on the merits because by that time the United States Court of Appeals for the Sixth Circuit had determined that the District Court did not have the power to adjudicate any facts of the dispute in view of the Anti-Injunction Act, 28 U.S.C. section 2283.[1] App. at pages 33, 45. That motion was denied. App. at page 2.

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[1] In affirming the District Court's decision on the grounds that the District Court did not have the power to adjudicate the case, the Sixth Circuit stated that an issue was raised about whether the Interstate Commerce Commission decision merely held that the rail line on the Bridge was abandoned, as opposed to holding, as had the District Court

(Continued on following page)

On January 12, 2005, the Kentucky Supreme Court denied Martingale's Motion for Discretionary Review. App. at page 1.

This Petition for Certiorari follows that denial.

In the related federal court proceeding filed in the United States District Court for the Western District of Kentucky in April 2001, the Petitioner here challenged, primarily on federal law bases, the right of the City of Louisville to condemn the Bridge. The District Court issued its final decision on June 5, 2002 granting summary judgment dismissing the federal action on the merits, finding that the Bridge had been abandoned. App. at page 32.

On March 17, 2004, the Sixth Circuit affirmed the dismissal of the District Court action but *not* on the merits as determined by the District Court. Rather, the Sixth Circuit relied instead upon 28 U.S.C. section 2283, the Anti-Injunction Act, holding that the statute removed the power of the District Court to decide the case on its merits. App. at pages 33, 45.

The United States Supreme Court denied Martingale's Petition for Certiorari on November 1, 2004. App. at page 46.

II. FACTUAL BACKGROUND

The Big Four Bridge over the Ohio River connecting Louisville, Kentucky and Jeffersonville, Indiana was constructed between 1888 and 1895, and reconstructed in 1928 by the Louisville and Jeffersonville Bridge Company.

Judge, that the Bridge itself had been abandoned in the I.C.C. proceeding. App. at page 35 n.1.

Both the construction and the reconstruction of the Big Four Bridge were approved under an Act of the United States Congress. See, e.g., Act of December 17, 1872, Ch. IV, 17 Stat. 398. App. at page 47. The United States Secretary of War, under authority of that Act, granted the Louisville and Jeffersonville Bridge Company[2] the right to operate the Bridge across the Ohio River for railroad or other uses, including the use of the Bridge as a post-road.

The existing Bridge was recognized by the Rivers and Harbors Act of 1899, 33 U.S.C. section 401. However any modification of the Bridge structure requires authorization of the U.S. Army Corps of Engineers. App. begining at page 57. Thus, to the extent either Martingale or the City of Louisville seeks to re-deck the Bridge and convert it into a pedestrian walkway, it must obtain federal approval.

In 1969 Martingale and Bridge the Gap's predecessor abandoned the rail line on the Bridge in issue in a proceeding before the ICC. The abandonment Application filed by the Big Four and Penn Central Railroads plainly was for the abandonment, **not of the Bridge**, itself, but only **of the rail line on** the Bridge. Thus, the Petition lists the subject matter of the proceeding as:

> RE: Application of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company and Penn Central Company under Section 1 (18-20) of the Interstate Commerce Act for a certificate that the present and future public convenience and necessity permit of [sic] the **abandonment of their line of**

[2] The Bridge Company was legislatively chartered by Kentucky General Assembly specifically to build the Bridge in question. See App. at page 52.

> **railroad** extending from Milepost 0.0 in the City of Jeffersonville, Clark County, State of Indiana, to Milepost 2.0 in the City of Louisville, Jefferson County, State of Kentucky, a distance of about 2.0 miles; . . .

Emphasis added.

This description of the subject matter of the ICC proceeding is repeated throughout the documents submitted to the ICC and is contained in the ICC's final certificate and order which permits only the "abandonment of operations by Penn Central Company **of the lines of railroad described above**." See App. at page 59. Emphasis added.

Bridge the Gap acquired the Bridge at a Sheriff's Sale in 1987.

Over the years, Bridge the Gap commercially used the Bridge by selling advertising space on the Bridge superstructure.

During the ensuing years, the approaches to the Bridge were taken down and the Bridge, as it is currently structured, does not readily permit pedestrian access. However, the span of the Bridge and its old deck are still in existence.

In late 2000, Bridge the Gap sold the Bridge to Martingale subject to certain contingencies. Martingale planned to use the Bridge as part of a large scale residential development in Jeffersonville, Indiana. Martingale proposed to re-deck the Bridge to permit pedestrian traffic across the Ohio River from its development on the Indiana side to the Kentucky side.

REASONS FOR GRANTING THE WRIT

The Kentucky Court of Appeals has taken unto itself the right to determine the existence of and to order the condemnation of a franchise granted by the federal government. Without the explicit consent of the United States, a State court may not make these determinations in a collateral proceeding. This Petition for a writ of certiorari should be granted because, pursuant to Sup. Ct. R. 10(c), the decision of the Kentucky Court of Appeals involves the resolution of an important question of federal law that should be settled by this Court. The decision of the Kentucky Court of Appeals, as demonstrated below, plainly conflicts with relevant decisions of this Court as well as the overarching legal principle embodied in the Constitution's Supremacy Clause, art. VI, cl. 2.

I. A state municipality may not condemn a federal bridge franchise granting interstate rights over a navigable river.

The United States Supreme Court has on numerous occasions been called upon to determine the nature of the permission under federal law to construct and maintain a bridge over navigable waters, such as the Big Four Bridge over the Ohio River at Louisville. **The Court has always held such bridges to be federal franchises.**

When Congress acted to authorize the construction of bridges, such as the Big Four Bridge, and when that Bridge was constructed with the consent of the Secretary of War, these acts were the supreme laws of the land. Very early in our constitutional history, this Court in *M'Culloch v. Maryland*, 17 U.S. 316, 322 (1819) recognized that no act

of a state could "retard, impede, burden or in any manner control operations of . . . " the supreme laws of this land.

Accordingly, in *State of California v. Central Pac. R. Co.*, 127 U.S. 1, 40 (1888), the United States Supreme Court characterized the grant of authority by the United States Congress to corporations to construct railroads across the states as "most important franchises."

> What is a franchise? . . . **a franchise is a right, privilege, or power of public concern, ... Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority.**

Emphasis added. In so ruling, the Supreme Court limited any authority the individual states might have to regulate franchises granted by Congress.

> Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, . . . They were granted to the company for national purposes, and to subserve national ends. **It seems very clear that the state of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens.**

Id. Emphasis added.

Nichols, *Law of Eminent Domain*, § 2.222, at 2-114 (3d ed. 2004) unequivocally applies this principle to eminent domain proceedings brought against federally chartered interstate facilities. Where railroad and other corporations engaged in interstate commerce have been chartered by Congress "to assist in carrying on one of the functions

assigned by the constitution to the federal government, a state cannot hamper the actions of such corporation by taking its property by eminent domain . . . "

Plainly then, in the words of the Supreme Court, a state may not abridge, and it certainly may not condemn, a federal franchise.

II. A state court may not in a collateral proceeding determine that a federal franchise has been abandoned without the approval of the United States.

When the principle that franchise rights granted by the United States cannot be taken away from a person without the permission of the United States is combined with the general legal principle that franchises, whatever the source, may not be attacked in collateral proceedings, it is readily apparent that the decision in this case must be overturned.

In *U.S. v. Northern Pac. Ry. Co.*, 177 U.S. 435, 441 (1900), the argument had been made that federal rights granted to a railroad had been forfeited because of a failure of the railroad to complete construction of railway lines within the time period required in the grant. It was argued that "such failure operated ipso facto as a termination of all right to acquire any further interest in any lands. . . ." The Supreme Court held, however, that such a failure did not operate ipso facto as a revocation of the grant. Rather the failure only authorized "the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress . . . " *citing Schulenberg v. Harriman*, 88 U.S. 44 (1874). Likewise, in *St. Louis, I.M. & S. Ry. Co. v. McGee*, 115 U.S. 469, 473-74 (1885), the

Supreme Court recognized that where Congress has granted land rights to an entity (in *McGee*, land rights to a railroad) those rights "do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or some legislative action, legally equivalent to a judgment of office found at common law."

Because the right to maintain a bridge across a navigable waterway in interstate commerce is a valuable franchise granted by the federal government, that franchise may only be deemed to have been abandoned in a direct proceeding in which the United States is a party. Given that the United States Congress authorized the construction of the Bridge, neither the City of Louisville nor the courts of Kentucky have the power to take that which has been granted by Congress.

Louisville cites *Hayfield Northern R. Co. v. Chicago and Northwestern Transp. Co.*, 467 U.S. 622 (1984) for the proposition that a state may, without federal consequence, condemn a bridge which had on it a rail line whose abandonment has been authorized by the Interstate Commerce Commission. However, as demonstrated by the order of the Interstate Commerce Commission appearing in the App. at pages 59-61, what was abandoned here was not the Bridge itself but rather the rail lines on the Bridge. Indeed, interstate bridges over navigable rivers are not regulated by the I.C.C. at all but rather by the Coast Guard and the U.S. Army Corps of Engineers. See e.g. App. at pages 57-58.

Moreover, in *Hayfield*, the Supreme Court held that 49 U.S.C. section 10905 (1984) did not preempt state condemnation proceeding over an abandoned rail line. The statute in

issue in *Hayfield* was determined by the Supreme Court not to involve "express pre-emption." *Id.* at 627-28. In contrast, 49 U.S.C. section 10501, which was adopted in 1995 and amended in 1996, a decade after the *Hayfield* decision, contains an explicit preemption provision which has been broadly applied by other courts. 49 U.S.C. section 10501(b)(2) provides specifically that "the remedies provided under this part with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law." The breadth of this statute is emphasized by the first part of section 10501(b)(2) which provides that the jurisdiction of the federal Surface Transportation Board over the " . . . acquisition . . . abandonment, or discontinuance of . . . [rail] facilities, even if the tracks are located . . . entirely in one State, is exclusive."

Thus, in *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1295, (D. Mont. 1997), the Court found that 49 U.S.C. section 10501 "contains an express preemption clause, providing that the remedies stated thereunder with respect to the regulation of rail transportation are exclusive and that those remedies preempt the remedies provided under federal or state law. The Act reserves no area of regulation for the individual states . . . " Accordingly, in *In re Conservation Law Foundation*, 782 A. 2d 909, 912 (N.H. 2001), the Supreme Court of New Hampshire distinguished *Hayfield* because section 10501 was adopted well after the issuance of the *Hayfield* decision. Other courts have come to similar conclusions. See *Village of Ridgefield Park v. New York Susquehanna and Western Ry. Corp.*, 724 A. 2d 267 (N.J. Super A.D. 1999) (finding field preemption under section 10501.)

For these reasons, the courts of Kentucky in a collateral proceeding by a municipality do not have the jurisdiction to adjudicate a) whether a federal franchise exists, b) whether a federal franchise has been abandoned as a matter of fact, or c) whether a federal franchise has been abandoned as a matter of law.

III. Allowing state courts to adjudicate rights respecting federal franchises will undermine the supremacy of explicit federal law.

The consequences of the Kentucky Court of Appeals' holdings are unprecedented. For example, with respect to federally chartered interstate railroads, this decision seems to hold that a state court is free to determine that a railroad line has been abandoned even though the issue of abandonment is wholly relegated to the Surface Transportation Board, particularly under 49 U.S.C. section 10501. Moreover, based on the holdings of the Kentucky Court of Appeals in this case, without hearing from the Federal Communications Commission, the Kentucky Courts apparently are now free to determine that a broadcast license has been abandoned or forfeited because of actions of the licensee. In fact, the Kentucky Courts could find that **any** license, permit or charter granted by the federal government is invalid or order its seizure in a state condemnation proceeding.

This case squarely presents an important issue involving the intersection of federal perogatives and state rights under the Supremacy Clause of the U.S. Constitution. Put plainly, state courts should not have the authority to order condemnation of federally granted rights particularly in an area of paramount federal interest – interstate commerce. State courts simply should not be

permitted to adjudicate that a federal franchise to operate an interstate facility has been abandoned, without the consent of the federal government. And where, as here, a federal statute expressly preempts state action, state courts simply do not have the power to adjudicate any issues – factual or legal – about a federal franchise.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of Kentucky

2004-SC-736-D
(2003-CA-74-MR)

MARTINGALE, LLC. MOVANT

JEFFERSON CIRCUIT COURT
V. 2001-CI-5158

THE CITY OF LOUISVILLE, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

ENTERED January 12, 2005.

/s/ Joseph E. Lambert
Chief Justice

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-000074-MR

MARTINGALE, LLC. APPELLANT

JEFFERSON CIRCUIT COURT

V. 2001-CI-5158

COMMONWEALTH OF KENTUCKY, ET AL. APPELLEES

* * *

ORDER

BEFORE: GUIDUGLI, JOHNSON AND MINTON, JUDGES.

This Court has considered appellant's motion for reconsideration of the Opinion and Order entered on July 9, 2004. No response has been filed.

Having considered the motion, the Court ORDERS the motion be, and it is hereby, DENIED.

ENTERED: 8-10-04 /s/ John Minton
JUDGE, COURT OF APPEALS

Court of Appeals of Kentucky.
MARTINGALE, LLC, Appellant,
v.
CITY OF LOUISVILLE; County of Jefferson;[1]
Bridge the Gap, Inc; and
Commonwealth of Kentucky, Appellees.

No. 2003-CA-000074-MR.

July 9, 2004.
Reconsideration Denied Aug. 13, 2004.
Discretionary Review Denied by
Supreme Court Jan. 12, 2005.

Donald L. Cox, William H. Mooney, Lynch, Cox, Gilma & Mahan, P.S.C., Louisville, KY, for Appellant.

James R. Williamson, Bethany A. Breetz, Stites & Harbison PLLC, Louisville, KY, for Appellee City of Louisville.

Before GUIDUGLI, JOHNSON, and MINTON, Judges.

OPINION AND ORDER

MINTON, Judge.

This appeal arises following the condemnation of a bridge across the Ohio River, known as the Big Four Bridge. Martingale, LLC argues that the City of Louisville lacked the authority to condemn the bridge under principles of eminent domain, or in the alternative, that the condemnation was done improperly. Martingale attempted to enjoin the condemnation action through a separate suit

[1] This appeal was filed before the merger of the two entities.

in the federal courts, but was unsuccessful in seeking relief.[2]

Though the history of the bridge begins in 1888, the instant case has its genesis more recently. The circuit court provided a succinct background which we incorporate as follows:[3]

> In Jefferson Circuit Court Case No. 86-CI-05157,[4] a personal judgment was recovered against The Louisville & Jeffersonville Bridge Corporation ("LJBC["]), and the Jefferson County Sheriff levied against LJBC's personal property interest in the Big Four Bridge. (The bridge's superstructure had been severed from the underlying real estate.) At the Sheriff's sale on October 16, 1987, Bridge the Gap purchased the bridge's superstructure for the sum of $10,300. Subsequently, Bridge the Gap entered into an agreement to sell said superstructure to Martingale.
>
> On December 7, 2000, the Board of Aldermen's Resolution No. 268, authorizing the City of Louisville [] to bring a condemnation action on behalf of the Waterfront Development Corporation ("WDC") in connection with the development of

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[2] *See Martingale LLC v. City of Louisville*, 361 F.3d 297 (6th Cir.2004). The Court held that Martingale's attempted action is barred by the Anti-Injunction Act, 28 USCA § 2283.

[3] We note at this point that Martingale failed to provide a copy of the circuit court's opinion and order in the otherwise voluminous appendix to its brief, as mandated by Ky. R. Civ. P. (CR) 76.12(4)(c)(vii). While we have chosen not to do so, we are authorized to impose sanctions for this failing under CR 76.12(8) and accordingly caution Martingale to be more cognizant of our rules in the future.

[4] Affirmed, *Louisville and Jeffersonville Bridge Corp. v. Senler, Campbell & Assoc., Inc.*, No. 88-CA-001098-MR (Opinion rendered Aug. 25, 1989, and designated not to be published).

Phase II of the Waterfront Park, was passed and approved. Condemnation proceedings were to be instituted if WDC was unable to negotiate a voluntary sale of the bridge with the property owner.

On April 25, 2001, Bridge the Gap and Martingale filed a declaration of rights action in the United States District Court for the Western District of Kentucky, to enjoin the City and WDC from pursuing a condemnation action. On July 27, 2001, the City brought this condemnation action as to the Kentucky portion of the bridge. The Big Four Bridge spans the Ohio River. A majority of the bridge is located in Kentucky, but a portion thereof is located in Indiana.

On August 6, 2001, the Court appointed three Commissioners to determine the difference between the fair market value of the Kentucky portion of the bridge before the taking and the fair market value remaining, if any, immediately after the taking. The August 22, 2001 Commissioners' Report set forth said difference to be $80,000.

On October 4, 2001, Bridge the Gap and Martingale filed a motion to set aside the Commissioner's Report for failing to comply with KRS 416.580 and/or to stay this condemnation action pending the adjudication of the parties' federal action.

The circuit court ultimately decided against Martingale and Bridge the Gap, holding that the City did have the authority to condemn the bridge and had proceeded properly in the condemnation.

Shortly before the scheduled oral arguments, the City moved to dismiss Martingale's appeal on the basis that

Martingale lacked a sufficient interest in the bridge to have standing to appeal. Martingale responded by asserting it did have an equitable interest in the bridge, and by moving to strike the City's motion because it relies extensively on matters not contained within the record prepared for this appeal.

Martingale is correct that the City relies extensively on matters not made part of the record before this appeal was taken. As an appellate Court, we generally do not consider matters outside the record.[5] Therefore, the City's attempted reliance on matters not presented to the circuit court until well after this appeal was filed is not well taken. Rather, any issue regarding Martingale's standing in the underlying condemnation action must be addressed in a subsequent appeal taken from the circuit court's final resolution of the matter,[6] at which time a proper record may be developed. Accordingly, we deny the City's motion to dismiss Martingale's appeal, and grant Martingale's motion to strike the City's motion.

Though presented in multiple sections, Martingale's arguments on appeal from the circuit court's judgment on the City's right to take essentially fit into two main groupings. The first is that Martingale possesses certain franchises granted by the United States, the Commonwealth of Kentucky, and the State of Indiana, and that the City lacks the authority to condemn these franchises. The second group of arguments is essentially that the City

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[5] *See, e.g.*, Ky. R. Civ. P. (CR) 75 *et seq.*; *White v. White*, Ky.App., 883 S.W.2d 502, 505 (1994).

[6] At the time of this writing, a motion for reconsideration of the circuit court's order dismissing Martingale from the underlying condemnation action remains pending.

failed to comply with various condemnation statutes, making the purported condemnation invalid.

Martingale's franchise argument is wholly without merit. As explained by the United States Supreme Court in *Monongahela Navigation Co. v. United States*,[7] the existence of a franchise, be it from the government of the United States or of an individual state, is not a bar to condemnation. Rather, it is a factor to be considered in determining the value of the property taken through condemnation. "[T]hat value depends largely upon the productiveness of the property, – the franchise to take tolls."[8] Therefore, the existence of a state or federal franchise would only affect the condemnation action to the extent that the City would be required to pay the reasonable value of the franchise taken.

However, in this case Martingale does not possess a valuable franchise from any government, state or federal. Martingale's predecessor petitioned the Interstate Commerce Commission to be allowed to abandon the bridge. The ICC declared that continued operation of the bridge would constitute an undue burden on interstate commerce which should no longer be permitted and accordingly granted the petition for abandonment in 1969. The approaches to the bridge were removed in 1974, making the bridge inaccessible.[9]

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[7] 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893).

[8] *Id.*, 148 U.S. at 329, 13 S.Ct. 622.

[9] The United States District Court, in similarly rejecting Martingale's arguments regarding the bridge's status as a post road, its role in interstate commerce, and the continued existence of state and federal franchises to collect tolls stated:

(Continued on following page)

The United States Supreme Court has acknowledged the possibility of abandonment of a franchise in both interstate and/or intrastate commerce.[10] "[T]he company [holding such a franchise] may withdraw its property from use by the public when that use can be kept up only at a loss."[11] Similarly, in *McConnell v. Crittenden County*,[12] Kentucky's highest Court was faced with a question of whether a ferry operator had abandoned his franchise across the Ohio River. While the Court held that no abandonment had occurred in that case, it can be inferred from its analysis that the Court presupposed the possibility that an abandonment of the ferry franchise was possible and legally permissible. Furthermore, the Court expressly held that a ferry franchise is property, and as such ordinary rules of property may be applied to questions involving franchises.[13]

In this case, whatever franchises were associated with the bridge were abandoned by Martingale's predecessor. The actions of petitioning the ICC to be allowed to abandon the bridge and removing the approaches to the bridge

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> First, the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures. It is inaccessible to humans, except those with extremely long ladders. The Bridge has not been in use as a means of transportation across the river for over 30 years. The approaches having been removed, the Bridge cannot be used as a means of transporting goods or people.

Slip Opinion at 5.

[10] *See Railroad Commission of Texas v. Eastern Texas R. Co.*, 264 U.S. 79, 44 S.Ct. 247, 68 L.Ed. 569 (1924).

[11] *Id.*, 264 U.S. at 86, 44 S.Ct. 247 (quotation omitted).

[12] 250 Ky. 359, 63 S.W.2d 329 (1933).

[13] *Id.*, 63 S.W.2d at 330.

manifest a clear intention to abandon any franchise to collect tolls, operate a post road, or any activity associated with commerce across the bridge. Therefore, Martingale possessed no franchises associated with the bridge, those franchises having been abandoned decades earlier.

Another of Martingale's arguments is that the condemnation failed to conform to the mandate of KRS 416.580(1) that the commissioners appointed by the circuit court consider the value of the entire property before the taking in calculating the difference in value after the taking. Martingale argues that it was error to only consider the value of the Kentucky side of the bridge in determining the value to be awarded following the condemnation. Martingale presents the interesting hypothetical wherein an owner of a building which straddles a state boundary is only compensated for a portion of the building which is demolished in one state, while a portion of the building remains standing in the other state. While this is an intriguing question which may need to be resolved in a proper case, this is not such a case.

Martingale's predecessor, Bridge the Gap, purchased its interest in the bridge at a sheriff's sale which was held to satisfy a judgment debt against the Louisville and Jeffersonville Bridge Corp. The Bridge Corp.'s only asset was the Big Four Bridge, which was seized to satisfy the outstanding judgment.

It is axiomatic that "[t]he sheriff of one state may not levy process issued by the courts of that state on property situated in another state, since no state tribunal can exercise jurisdiction over persons or property within the

borders of another state."[14] Here, the Jefferson County Sheriff had no authority to seize that portion of the bridge which is located within the borders of Indiana. Accordingly, Bridge the Gap purchased only that portion of the bridge located in Kentucky, and it is only that Kentucky interest which Bridge the Gap could sell to Martingale. Therefore the commissioners appointed by the circuit court had no obligation to consider the value of the portion of the bridge in Indiana because Martingale did not purchase an interest in it from Bridge the Gap. Like the circuit court, we do not undertake to answer the question of the ownership of the Indiana side of the bridge. We hold only that Bridge the Gap did not purchase any part of the bridge outside of Kentucky at the aforementioned sheriff's sale in 1987, which precludes Martingale's current ownership claim based exclusively on that sale. Any remaining question regarding the ownership of the Indiana side of the bridge is for the courts of Indiana.

Finally, we must address Martingale's argument that the city either lacked the statutory authority to condemn the bridge as personal property or did not follow the appropriate procedure. However, this argument ignores a point made clear by the circuit court's opinion; namely, that there are multiple avenues of condemnation available to the city and "avenue for condemnation does not preclude other avenues for condemnation."[15] We cannot improve on the circuit court's analysis of this issue, so we adopt it herein as follows:

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[14] 30 Am.Jur.2d *Executions and Enforcement of Judgments*, § 209 (citations omitted). *See also* KRS 426.010, *et seq.*

[15] Op. at 831.

[Martingale] also argues[s] that the City needed to set up a bridge commission to condemn the bridge under KRS 181.853(2). The Court agrees that KRS 181.853(2) gives a bridge commission the power to acquire by condemnation. However, under KRS 181.850(1), the City is not required to create a bridge commission but **may** do so. As a commission was not created by the City, KRS 181.853(2) is inapplicable.

[Martingale] further argue[s] that condemnation of the bridge for a park purpose needs to be ordered by the director of parks and recreation under KRS 97.257. They also contend that only real property can be condemned under this statute, but the plain language of KRS 97.257 does not support such a limitation. The language of KRS 97.257 is permissive rather than mandatory, as alleged by [Martingale], as it reads that the director of parks and recreation **may** order the condemnation. KRS 82.082(1) gives the City, under a grant of home rule, the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, KRS 416.540 to KRS 416.680. KRS 83.520 provides that the provisions of KRS Chapter 97, among others, shall be considered permissive rather than mandatory and restrictions therein shall not be considered abridging the complete grant of home rule.

[Martingale] also contend[s] that WDC is an instrumentality of the state and can only execute its right of eminent domain by requesting the Finance and Administration Cabinet to institute condemnation under KRS 416.560(3). This argument ignores the fact that WDC is also a city and county agency. As a city agency, in this instance, KRS 416.560(1) required WDC to request

> the City's governing body to institute condemnation proceedings on its behalf.
>
> Consequently, the Court finds that the City, acting on its own behalf and on behalf of WDC, has complied with the applicable condemnation statutes to this action.[16]

Accordingly, the judgment of the circuit court is AFFIRMED. The City's motion to dismiss is DENIED, and Martingale's motion to strike the City's motion is GRANTED.

ALL CONCUR.

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[16] Op. at 831-32 (original emphasis).

NO. 01-CI-05158 JEFFERSON CIRCUIT COURT
DIVISION EIGHT

CITY OF LOUISVILLE PLAINTIFF

V. **OPINION AND ORDER**

BRIDGE THE GAP, INC., et al. DEFENDANTS

* * *

This matter comes before the Court on a motion brought by Plaintiff, the City of Louisville ("City") to enter its interlocutory judgment and on a motion brought by Defendants, Bridge The Gap, Inc. ("Bridge the Gap") and Martingale, LLC ("Martingale"), for a directed verdict.

OPINION

In Jefferson Circuit Court Case No. 86-CI-05157, a personal judgment was recovered against The Louisville & Jeffersonville Bridge Corporation ("LJBC), and the Jefferson County Sheriff levied against LJBC's personal property interest in the Big Four Bridge. (The bridge's superstructure had been severed from the underlying real estate.) At the Sheriff's sale on October 16, 1987, Bridge the Gap purchased the bridge's superstructure for the sum of $10,300. Subsequently, Bridge the Gap entered into an agreement to sell said superstructure to Martingale.

On December 7, 2000, the Board of Aldermen's Resolution No. 268, authorizing the City of Louisville ("City") to bring a condemnation action on behalf of the Waterfront Development Corporation ("WDC") in connection with the development of Phase II of the Waterfront Park, was passed and approved. Condemnation proceedings were to

be instituted if WDC was unable to negotiate a voluntary sale of the bridge with the property owner.

On April 25, 2001, Bridge the Gap and Martingale filed a declaration of rights action in the United States District Court for the Western District of Kentucky, to enjoin the City and WDC from pursuing a condemnation action. On July 27, 2001, the City brought this condemnation action as to the Kentucky portion of the bridge. The Big Four Bridge spans the Ohio River. A majority of the bridge is located in Kentucky, but a portion thereof is located in Indiana.

On August 6, 2001, the Court appointed three Commissioners to determine the difference between the fair market value of the Kentucky portion of the bridge before the taking and the fair market value remaining, if any, immediately after the taking. The August 22, 2001 Commissioners' Report set forth said difference to be $80,000.

On October 4, 2001, Bridge the Gap and Martingale filed a motion to set aside the Commissioners' Report for failing to comply with KRS 416.580 and/or to stay this condemnation action pending the adjudication of the parties' federal action. The motion was denied by the Court on April 2, 2002.

On April 11, 2002, the City requested a hearing on its right to condemn, use, and occupy the bridge, and it filed a proposed interlocutory order giving it said right. On June 5, 2002, the federal court case was decided in favor of the City. (The decision has been appealed by Defendants).

The hearing on the City's right to take was held on September 18, 2002, at which Bridge the Gap and Martingale made a motion for directed verdict, which the Court

took under submission. At the hearing, Bridge the Gap and Martingale raised the following three issues: (1) lack of proof that the City negotiated in good faith with Bridge the Gap; (2) the funding to do Phase II of the development (which includes the bridge) has not been raised by WDC; and (3) the City failed to comply with certain condemnation statutes.

Three witnesses testified at the hearing. The first to testify on behalf of Defendants was Louisa Henson, the president of Bridge the Gap. Defendants' second witness was Frank Chuppa, a partner in Martingale. The last witness, David Karem, the executive director of WDC, was a rebuttal witness for the City. Subsequent to the hearing, the parties each filed a memorandum on the issues.

As to the issue of good faith negotiation, both Henson and Karem testified that there was a good faith effort on both sides in their negotiation, which is evidenced by correspondence over a two year period. As to funding, Karem testified that while WDC is still raising the money to complete the second phase of the development, WDC has promises from Rep. Ann Northup and the Board of Aldermen, which have always come through in the past. Karem testified that he was confident the funds would be there when needed, as WDC had raised sixty million to complete the first phase and had already raised approximately twenty million for the second phase.

As to the City's statutory compliance, Defendants argue that WDC can only condemn real property under KRS 58.140. However, as argued by the City, WDC did not file this action on its own and one avenue for condemnation does not preclude other avenues for condemnation.

Defendants also argue that the City needed to set up a bridge commission to condemn the bridge under KRS 181.853(2). The Court agrees that KRS 181.853(2) gives a bridge commission the power to acquire by condemnation. However, under KRS 181.850(1), the City is not required to create a bridge commission but **may** do so. As a commission was not created by the City, KRS 181.853(2) in [sic] inapplicable.

Defendants further argue that condemnation of the bridge for a park purpose needs to be ordered by the director of parks and recreation under KRS 97.257. They also contend that only real property can be condemned under this statute, but the plain language of KRS 97.257 does not support such a limitation. The language of KRS 97.257 is permissive rather than mandatory, as alleged by Defendants, as it reads that the director of parks and recreation **may** order the condemnation. KRS 82.082(1) gives the City, under a grant of home rule, the power of eminent domain in accordance with the provisions of the Eminent Domain Act of Kentucky, KRS 416.540 to KRS 416.680. KRS 83.520 provides that the provisions of KRS Chapter 97, among others, shall be considered permissive rather than mandatory and restrictions therein shall not be considered abridging the complete grant of home rule.

Defendants also contend that WDC is an instrumentality of the state and can only exercise its right of eminent domain by requesting the Finance and Administration Cabinet to institute condemnation under KRS 416.560(3). This argument ignores the fact that WDC is also a city and county agency. As a city agency, in this instance, KRS 416.560(1) required WDC to request the City's governing body to institute condemnation proceedings on its behalf.

Consequently, the Court finds that the City, acting on its own behalf and on behalf of WDC, has complied with the applicable condemnation statutes to this action.

The issue of the bridge being in interstate commerce and the issue of any franchises remaining with the Bridge were decided against Defendants in the federal action. This Court agrees with the federal court's reasoning and decisions on these matters.

Therefore, the Court enters the following Order:

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) the motion brought by Defendants, Bridge The Gap, Inc. and Martingale, LLC, for a directed verdict is DENIED; and

(2) the motion brought by Plaintiff, the City of Louisville, to enter its proposed interlocutory judgment is GRANTED, and said judgment will be signed and entered simultaneously with this Order.

DATED this 11th day of December, 2002.

/s/ Thomas J. Knopf
THOMAS J. KNOPF, JUDGE
Jefferson Circuit Court

cc: J. David Morris
Donald L. Cox & Christina Heavrin
Theodore L. Mussler, Jr.

NO. 01-CI-05158 JEFFERSON CIRCUIT COURT
DIVISION EIGHT

CITY OF LOUISVILLE PLAINTIFF

V. **INTERLOCUTORY ORDER AND JUDGMENT**

BRIDGE THE GAP, INC., et al. DEFENDANTS

* * *

On the 18th day of September, 2002 at ___ m., in the courtroom of the above Court, the Court conducted a hearing on the right of the Plaintiff, City of Louisville, Kentucky (the "City"), to condemn all of Property of Bridge The Gap, Inc.; Martingale, LLC; and Commonwealth of Kentucky County of Jefferson (hereafter the "Defendants"), which is the subject matter of this case, and on the right of the City to use and occupy all of the Defendants' Property, which is the subject matter of this case. The Court having considered all evidence submitted by the City and the Defendants', the pleadings, the arguments of counsel, and being otherwise sufficiently advised, makes the following Findings and enters the Orders and Judgment set out below.

THE COURT FINDS that:

1. The City of Louisville, Kentucky has the right to condemn, to use and occupy all of the Defendants' Property located in Kentucky, which the City seeks to condemn in this case:

2. The Commissioners appointed by the Court pursuant to KRS 416.580 have filed their "REPORT OF COMMISSIONERS" dated August 22, 2001.

3. All Defendants have been properly served with the Summons and the Complaint of the Plaintiff and those Summons have been returned.

4. The Defendants, Bridge The Gap, Inc. and Martingale, LLC, have filed their joint Answer, which places in issue the right of the City to condemn their property located in Kentucky.

5. The Commonwealth of Kentucky, County of Jefferson, has not placed in issue the right of the City to condemn the property in question.

6. The City has the "necessity", legal right and authority to condemn for a "public use" the Property belonging to Bridge The Gap, Inc. and Martingale, LLC, which the City seeks to condemn in its Complaint, and the City has the right to immediate use and occupancy of that Property, as provided for below.

Upon motion of the City of Louisville, Kentucky and in consideration of the REPORT OF COMMISSIONERS, all evidence in this case, all pleadings in this case, argument of counsel, and the Court being otherwise sufficiently advised;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. All parties to this action are properly before the Court.

2. The REPORT OF COMMISSIONERS herein conforms with KRS 416.580.

3. The City has the legal right and authority, pursuant to Kentucky's Eminent Domain Act, KRS 416.540-416.680, and other applicable laws to condemn for public use all Property located in the Commonwealth of Kentucky belonging to the Defendants, Bridge The Gap, Inc.; Martingale, LLC; and Commonwealth of Kentucky, which is described in the Complaint of the Plaintiff and which Bridge The Gap, Inc; Martingale, LLC; and Commonwealth of Kentucky County of Jefferson in their Answer described as the "Big Four Bridge" (the "Property").

4. The City is authorized to take immediate possession of the above described Property for the public purposes set forth in the Complaint upon the payment of all court costs in this action and payment of the amount awarded by the REPORT OF COMMISSIONERS to the Clerk of the Jefferson Circuit Court (the "Clerk"), pursuant to KRS 416.640. The Clerk shall handle the funds in accordance with the Local Rules of the Jefferson Circuit Court.

5. If no exception is taken to this Interlocutory Order and Judgment within thirty (30) days, the Master Commissioner of the Jefferson Circuit Court shall execute and deliver a deed, bill of sale or other instrument conveying all of the right, title and interest of Bridge The Gap, Inc. and Martingale, LLC in all portions of the Property located in Kentucky, to the City of Louisville, Kentucky upon payment of the Commissioner's Award set forth above, and in conformance with this Interlocutory Order and Judgment.

6. There being no just reason for delay, this is a final and appealable Interlocutory Order and Judgment. CR 54.02; *Putnam v. Fanning*, Ky., 495 S.W.2d 175 (1973).

/s/ Thomas J. Knopf
Thomas J. Knopf
Jefferson Circuit Court Judge

12/11/02
Date Entered

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

MARTINGALE, LLC, et al. — PLAINTIFFS

v. — CIVIL ACTION NO. 3:01CV-255-S

CITY OF LOUISVILLE, et al. — DEFENDANTS

MEMORANDUM OPINION

This action seeks to enjoin the City of Louisville ("the City") from condemning the structure known as the Big Four Bridge ("the Bridge")[1], which spans the Ohio River between Louisville, Kentucky and Jeffersonville, Indiana. The plaintiffs, Martingale, LLC and Bridge the Gap, Inc. (collectively "the plaintiffs") contend that the City does not have the legal authority [sic] condemn the Bridge. The City and the Waterfront Development Corporation, both defendants, move for summary judgment on the ground that there is no legal impediment to condemnation because the Bridge is an abandoned structure.

A party moving for summary judgment has the burden of showing that there are no genuine issues of fact and that the movant is entitled to summary judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151 60, 90 S. Ct. 1598, 16 L. Ed. 2d 142 (1970); *Felix v. Young*, 536 F.2d 1126, 1134 (6th Cir. 1976). Not every

[1] The complaint seeks declaratory and injunctive relief. There was no condemnation action pending at the time this action was filed. The City has since filed such a suit.

factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The dispute must also be genuine. The facts must be such that if they were proven at trial, a reasonable jury could return a verdict for the non-moving party. *Id.* at 2510. The disputed issue does not have to be resolved conclusively in favor of the non-moving party, but that party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). The evidence must be construed in a light most favorable to the party opposing the motion. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962).

I. Facts

The pertinent facts in this matter are undisputed.

In 1872, Congress authorized the United States Secretary of War to permit bridges to be erected across the Ohio River for various uses including railroad transportation.[2] In 1888, the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company (the "Bridge Company").[3] The General Assembly granted the Bridge Company "the right and power to construct, maintain and operate" a bridge to make rail

[2] Act of December 17, 1872, Ch. IV, 17 Stat. 398.

[3] 1888 Ky. Acts 212.

connections between the lines of railroad on each side of the Ohio River.[4] In February, 1889, the plans of the Bridge Company for the construction of the Bridge were approved.[5] The Bridge was completed in 1895.

On October 4, 1927, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company (known as the "Big Four") became the sole owner of the Bridge Company.[6] In 1928 and 1929, the bridge and approaches were rebuilt.[7] The Bridge Company operated the property until March 2, 1955, when the Bridge Company was merged into the Big Four which became the Bridge's owner.[8] Beginning on February 1, 1968, Penn Central Company became an additional authorized operator of the Bridge.[9] In late 1968, Big Four and Penn Central Company filed an application with the United States Interstate Commerce Commission ("ICC") to abandon the Bridge on the ground that its continued operation would constitute a "financial burden . . . and an undue burden on interstate commerce."[10] The abandonment was sought "because the merger of the former New York Central Railroad Company . . . into . . . Penn Central has made said segments of line, which include a bridge across the Ohio River, surplus facilities no longer needed for the present and future convenience of

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[4] *Id.* and ICC Abandonment Application and Questionnaire, 2A.

[5] Declaration of William C. Endicott, Secretary of War, February 28, 1889.

[6] ICC Abandonment Application and Questionnaire, 2A.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] Application for Abandonment, pg. 12, ¶ 18A.

the public."[11] The ICC approved the abandonment on May 1, 1969, concluding that

> operations are no longer needed over these lines as service is furnished over alternate facilities of applicant; that no user will be adversely affected by the abandonments; that substantial savings will result to applicants upon abandonments; and that continued maintenance and operation of the lines would impose an undue and unnecessary burden on applicant and upon interstate commerce.[12]

In 1974, the approaches to the Bridge were removed, leaving only the piers and superstructure of the Bridge. The removal of the approaches rendered the Bridge inaccessible and unusable.

On October 16, 1987, Bridge the Gap, Inc. purchased the Bridge at a sheriff's sale. It did not acquire any real property on the Kentucky shore; only the piers in the river and the bridge superstructure such as it was, unconnected to any approach on either end.[13]

On February 16, 1995, the Waterfront Development Corporation ("WDC") purchased the real property on the Kentucky side of the Ohio River adjacent to the Bridge.[14]

WDC later unsuccessfully sought to purchase Bridge the Gap's interest in the Bridge, but on December 7, 2000,

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[11] Application for Abandonment, pg. 2, ¶ e.

[12] Certificate and Order of Abandonment, May 1, 1969.

[13] Jefferson Circuit Court Orders of November 24, 1987 and May 9, 1988.

[14] Deed, Kurt Bendl to WDC, February 16, 1995.

Bridge the Gap sold its interest to Martingale, LLC, retaining the right to display holiday lights on the Bridge for a period of ten years.[15]

WDC envisions the renovation and development of the Bridge as a pedestrian bridge linking Louisville with Jeffersonville as part of its development of Louisville's Waterfront Park.

II. Analysis

Having been unable to negotiate the purchase of the Bridge from either Bridge the Gap or Martingale, LLC, the City, on behalf of WDC, sought to acquire it by condemnation. Kentucky Revised Statutes ("KRS") 97.257 states:

> Whenever property shall be needed by any city of the first class for any park, playground, or community center purpose contemplated in KRS 97.250 to 97.257, either within or beyond the boundaries of such city, in the county in which such city is located, the director of parks and recreation may, with the consent of the legislative body of such city, order the condemnation of such property in the manner provided in the Eminent Domain Act of Kentucky.

The Eminent Domain Act, KRS 416.540, et seq., provides:

> Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is

[15] Contract of Sale, Bridge the Gap, Inc. to Martingale, LLC, December 15, 2000.

> authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670.

KRS 416.550[16]

A.

The plaintiffs contend that the City cannot condemn a bridge that is in interstate commerce. They rely to section 401 of the Rivers and Harbors Act, 33 U.S.C. § 401, et seq., for the proposition that it is not within the power of either state or local government to effect the condemnation of a bridge over navigable waters which forms a part of interstate commerce.

First, the contention that the Bridge is in interstate commerce is ludicrous. The structure is usable only by pigeons and other winged creatures. It is inaccessible to humans, except those with extremely long ladders. The Bridge has not been in use as a means of transportation across the river for over 30 years. The approaches having been removed, the Bridge cannot be used as a means of transporting goods or people.

The Bridge was formally abandoned by the ICC, which concluded that continued maintenance and operation would constitute an undue burden on interstate commerce. When the ICC's regulatory control over the

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[16] The plaintiffs would have the court limit the right of condemnation to real property. The plain language of the statute does not suggest such a limitation and this court will decline to give it such a reading.

Bridge was relinquished, interstate commerce ceased. *Hayfield Northern R.R. Co. v. Chicago & Northwestern Transportation Co.*, 404 S.Ct. 2610 (1984).[17] We reject utterly the notion that the Bridge forms any part of interstate commerce.

Second, the plaintiffs have failed to demonstrate that the Rivers and Harbors Act prohibits the City's condemnation of the Bridge. No specific section of the Act is cited, and possibly for good reason. Our own review indicates that the Act does not prohibit condemnation. We conclude that the plaintiffs' reliance on the Rivers and Harbors Act is misplaced.

B.

The plaintiffs contend that condemnation is precluded by the Commerce Clause and the Post Roads Clause of the United States Constitution.[18] Bridges built over navigable waters were designated as "post routes," in accordance with the Act of Dec. 17, 1872, ch. IV, 17 Stat. 398 and the Bridge Act of 1906.[19] The plaintiffs argue that once a post route is designated, it is in interstate commerce and cannot thereafter be condemned. No authority is cited for this proposition.

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[17] We reject the contention that the December display of holiday lights on the remaining bridge structure constitutes ongoing commercial use of the Bridge in interstate commerce.

[18] U.S. Const. Art. I, § 8, cl. 3 and cl. 7.

[19] 33 U.S.C. § 492.

Designation of the Bridge as a post route in the late 1800s does not preclude its abandonment and condemnation in 2002 after many years of disuse. We find nothing in the Constitution which requires the perpetuation of an inaccessible, abandoned bridge structure in order to preserve a long-unused post route designation.

C.

The plaintiffs claim that franchises from the United States and from the states of Kentucky and Indiana preclude condemnation of the Bridge. They urge that these franchises, granted to construct and operate the Bridge, remain viable and have passed with the structure to its current owner. The plaintiffs have provided a copy of the Kentucky legislation granting franchise rights to the Bridge Company to operate the Bridge and to collect tolls.[20] They have also provided a copy of generalized legislation from the State of Indiana authorizing the formation of associations for the purpose of building bridges and collecting tolls. The Indiana statute is not specific to the bridge in question here, but was applicable to it.[21] The plaintiffs contend that once granted, these franchises are perpetual and may not be terminated by the City. For a number or [sic] reasons, the court finds this argument unavailing.

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[20] Acts of the General Assembly, KY, § 2 (1888).

[21] Indiana General Laws, Chapter VIII, March 2, 1875.

(1)

The cases cited by the plaintiffs involved franchises that were operational at the time revocation or restriction of the franchise was attempted. *See, ie., City of Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U.S. 649, 32 S.Ct. 572, 56 L.Ed, 934 (1912) (city attempted to revoke franchise for telephone systems); *Grand Trunk R.R. Co. v. City of South Bend*, 227 U.S. 544, 33 S.Ct. 303, 57 L.Ed. 633 (1913) (city sought to preclude the laying of additional track by holder of franchise for freight and passenger trains); *Williams v. Citizens' Ry. Co.*, 29 N.E. 408 (Ind. 1891) (franchise holder for electric street railway sought to preclude relocation of a building that would destroy railway's wires and poles).

In this instance, the claimed franchise rights are for the transport of goods and persons across the Ohio River and for the collection of tolls. These are rights which have not been exercised since the ICC approved abandonment over 30 years ago. The Bridge has been inaccessible for over 25 years. The facts here differ markedly from those cases cited by the plaintiffs.

(2)

We believe that the franchises were forfeited in 1969 when the application for abandonment of the Bridge was granted by the ICC. The ICC declared at the time that continued operation of the Bridge would constitute an undue burden on interstate commerce and should no longer be permitted. A franchise may be deemed forfeited when it ceases to serve the public. In *Jack v. Williams*, 113 F.823 (D.S.C. 1902), the court stated:

> If a corporation is created, the franchise to be a corporation can be given only by the sovereign . . . The consideration for these acts of the sovereign is the utility of the enterprise to the public. To be thus useful to the public, the road must be kept in such a condition that life and property both must be made as safe as practicable . . . Whilst thus serving the public, however, no corporation or private person is obliged to continue the service without a reasonable remuneration . . . The question is not as to the existence of the duty, but as to its extent and qualifications. The duty of a railroad company is not more than to meet the public wants. If trains run at reasonable and moderate fares, and cannot be supported, it is because they are not needed . . . In such case the company may cease operating the road, unless this be contrary to the express terms of the charter . . . [T]hey exercised this option, and forfeited the franchises . . .

Jack, 113 F. at 826-31.[22]

(3)

The City contends that it does not seek to revoke the franchises. Rather, it seeks to acquire any existing rights, including franchise rights, by eminent domain. In *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463 (1893), where a lock and dam were

[22] The plaintiffs suggest that the franchises should be deemed perpetual because the association formed under the Indiana grant was perpetual in duration. They cite no authority for the contention that the duration of the life of the association defines the duration of a franchise granted by a state or the Federal government.

condemned, payment of compensation for the value of an attendant active franchise was authorized. So, even if the franchises were not forfeited, their value, if any, can be qualified and compensated in the condemnation litigation. We conclude that, if the franchises still exist, they are no bar to eminent domain proceedings.

III. Conclusion

The defendants are entitled to summary judgment as to all claims in the amended complaint. A separate order will be entered herein this date in accordance with this opinion.

This 5th day of June, 2002.

/s/ _____
CHARLES R. SIMPSON III,
JUDGE
UNITED STATES DISTRICT
COURT

cc: Counsel of Record

361 F.3d 297

United States Court of Appeals,
Sixth Circuit.

MARTINGALE LLC; Bridge the Gap, Inc.,
Plaintiffs-Appellants,
v.
CITY OF LOUISVILLE;
Waterfront Development Corporation,
Defendants-Appellees.

No. **02-5895.**

Argued: Oct. 22, 2003.
Decided and Filed: March 17, 2004.
Rehearing Denied April 14, 2004.

Donald L. Cox (argued and briefed), William H. Mooney (briefed), Christina M. Heavrin, Lynch, Cox, Gilman & Mahan, Louisville, KY, Theodore L. Mussler, Jr. (briefed), Mussler & Associates, Louisville, KY, for Plaintiffs-Appellants.

John L. Tate (argued and briefed), Emily R. Hartlage (briefed), Stites & Harbison, Louisville, KY, J. David Morris (briefed), City of Louisville, Louisville, KY, Jason P. Thomas, Stites & Harbison, Frankfort, KY, for Defendants-Appellees.

Before: BOGGS, Chief Judge; GIBBONS, Circuit Judge; GWIN, District Judge.*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

GWIN, District Judge.

In this case, Martingale, LLC ("Martingale") and Bridge the Gap, Inc. ("Bridge the Gap") appeal the district court's ruling permitting the City of Louisville ("City") and the Waterfront Development Corporation to condemn a structure known as the Big Four Bridge. The Big Four Bridge connects Jeffersonville, Indiana with Louisville, Kentucky. The City and the Waterfront Development Corporation wish to use the bridge as part of a public park, but Martingale and Bridge the Gap contend that the City has no legal power to condemn the bridge.

For the following reasons, the district court's decision is AFFIRMED.

I. Background

The story of this case begins in 1888, when the Kentucky General Assembly chartered the Louisville and Jeffersonville Bridge Company ("Bridge Company"). The Bridge Company's charter provided it the "right and power to construct, maintain and operate" a bridge to make rail connections between the railroad lines on each side of the Ohio River. A year later, the Bridge Company approved final plans for the bridge, and in 1895, construction was completed.

In 1927, the Cleveland, Cincinnati, Chicago, and St. Louis Railroad Company (known as the "Big Four Railroad Company") acquired an interest in the bridge from the Bridge Company. Over the following two years, the bridge and its approaches were rebuilt. Years later, in 1955, the

Bridge Company and Big Four merged, making Big Four the bridge's sole owner and the operator.

Through a series of subsequent mergers, Big Four became a part of the Penn Central Transportation Company ("Penn Central"). In 1968, Penn Central decided that due to its merger with the New York Central Railroad Company, certain rail lines were surplus, and that continuing to operate these lines would be a "financial burden . . . and an undue burden on interstate commerce." The rail line crossing the bridge was one such line. A year later, the Interstate Commerce Commission ("ICC") approved Penn Central's application to abandon the bridge. In 1969, the rail line spanning the bridge was thus abandoned.[1]

Five years later, the bridge's approaches were removed. The bridge remains in this condition today, completely inaccessible to humans. For the past thirty years, the bridge has not been functional.

The bridge's abandonment did not stop the transfer of the bridge. Penn Central Transportation Company went bankrupt in 1970 and transferred all of its properties other than operating railroads to the Penn Central Corporation. But the Penn Central Corporation did not keep the bridge, either. In 1982, Charles R. Hammond ("Hammond") acquired the bridge and then transferred it to the Louisville and Jeffersonville Bridge Corporation

[1] The record is not clear on what exactly was abandoned. One way to read the record indicates that only the rail line was abandoned, and that the ICC proceeding had no effect on the bridge. Another interpretation holds that Penn Central abandoned the bridge when it abandoned the rail line. Regardless, this ambiguity does not affect our resolution of the case.

("Bridge Corporation"), of which he was president. Hammond then transferred all of the real property associated with the bridge, but not the bridge itself, to the Kentucky Real Estate Holding Corporation.

In 1987, Bridge the Gap acquired the bridge at a Sheriff's sale for $10,300. The Waterfront Development Corporation purchased the real estate surrounding the bridge pylon on the Kentucky side of the river in 1995. In 2000, Bridge the Gap sold its interest in the bridge to Martingale for $400,000, retaining only the right to display holiday lights on the bridge for a ten-year period.[2]

Hoping to use the bridge as a pedestrian walkway as a part of the City's Waterfront Park, the City of Louisville passed a resolution authorizing condemnation of the bridge on November 28, 2000. In April 2001, Bridge the Gap and Martingale sued in the United States District Court for the Western District of Kentucky. Their suit sought a declaratory judgment of their right to insulate the bridge from condemnation, an injunction restraining the City of Louisville and the Waterfront Development Corporation from condemning the bridge, compensatory damages, costs, and attorneys' fees. In July 2001, the City filed suit in Kentucky state court to condemn the bridge.

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[2] Because the sale contract was contingent upon the grant of certain permits from the City and the Waterfront Development Corporation, the sale may not have been consummated. However, Martingale apparently has at least an equitable lien on the Bridge under the terms of the contract.

On June 5, 2002, the district court entered summary judgment in favor of the City and the Waterfront Development Corporation. The court reasoned that: (1) the bridge is not in interstate commerce; (2) the Rivers and Harbors Act does not prohibit condemnation of the bridge; (3) the bridge's status as a post route does not prohibit condemnation; and (4) the plaintiffs' alleged franchises had been forfeited in 1969 when the ICC permitted Penn Central to abandon the bridge. Additionally, the district court held that even if the plaintiffs possessed the alleged franchises, this was no bar to condemnation because the City and the Waterfront Development Corporation could condemn the franchises and pay the plaintiffs reasonable compensation for them. Plaintiffs Martingale and Bridge the Gap now appeal the district court's grant of summary judgment.

II. Summary of the Parties' Arguments

Martingale and Bridge the Gap argue that summary judgment was inappropriate because they presented enough evidence to the district court to create issues of material fact with regard to: (1) whether the bridge is in interstate commerce, and if so, whether the City's attempt to condemn it is an impermissible burden on interstate commerce; (2) whether the bridge and any franchises to operate it were abandoned as a matter of law under the ICC's procedures for abandoning a rail line; (3) whether a municipality in Kentucky can condemn a federal, Kentucky, or Indiana franchise to own and operate bridge over the Ohio River; and (4) whether the City of Louisville can condemn personal property for use in a park.

The City of Louisville and the Waterfront Development Corporation respond by arguing that there are no issues of material fact regarding any of the above-mentioned issues, and that the district court correctly granted judgment in their favor as a matter of law. Additionally, the City and the Waterfront Development Corporation say that the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits this Court from enjoining a state court condemnation proceeding.

The Court analyzes these arguments below.

III. Standard of Review

An appellate court reviews a district court's grant of summary judgment *de novo*. *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 597 (6th Cir.1999). Summary judgment is appropriate where the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-moving party's case. *Waters v. City of Morristown,* 242 F.3d 353, 358 (6th Cir.2001). A fact is material if its resolution will affect the outcome of the lawsuit. *Daughenbaugh v. City of Tiffin,* 150 F.3d 594, 597 (6th Cir.1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Once the moving party satisfies its burden, the burden shifts to the non-moving party to set forth specific facts showing a triable issue. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). It is not sufficient for the non-moving

party merely to show some possibility of doubt as to the material facts. *Id.*

In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. *National Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997). Ultimately the Court must decide "whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir.1996) (internal quotations omitted).

IV. Analysis

The City and the Waterfront Development Corporation assert that even if Martingale and Bridge the Gap's arguments are meritorious, the federal Anti-Injunction Act, 28 U.S.C. § 2283, barred the district court from granting the requested relief. If the City and the Waterfront Development Corporation are correct, then we need not reach the merits of the case with respect to Martingale and Bridge the Gap's claims for declaratory and injunctive relief. For this reason, we open our analysis with this issue.

The district court did not address the Waterfront Development Corporation and the City's Anti-Injunction Act argument. Regardless, this Court may consider it. This would be the case even if the parties did not raise the issue. *See, e.g., Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.,* 848 F.2d 12, 15 (1st Cir.1988); *Hickey v. Duffy,* 827 F.2d 234, 243 (7th Cir.1987).

According to the City and the Waterfront Development Corporation, the Anti-Injunction Act forbade the district court from granting the relief that Martingale and Bridge the Gap requested. The City and the Waterfront Development Corporation claim that the Anti-Injunction Act bars relief because Martingale and Bridge the Gap seek injunctive relief and because their claims do not fit into any of the Anti-Injunction Act's three exceptions.

In response, Martingale and Bridge the Gap assert that the Anti-Injunction Act is inapplicable because they seek declaratory relief in addition to an injunction. Additionally, they argue that the Anti-Injunction Act cannot apply because they requested that the injunction be directed against the City and the Waterfront Development Corporation, not against the state courts. Finally, Martingale and Bridge the Gap assert that the Anti-Injunction Act does not prohibit injunctions that forbid the commencement of state court proceedings.

We now turn to these arguments, using the text of the Anti-Injunction Act as a starting point. The Anti-Injunction Act states in full:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283. The Supreme Court has, on several occasions, recognized that the Anti-Injunction Act creates "an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions." *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs,* 398 U.S. 281, 286-87, 90

S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970); *see also Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31, 97 S.Ct. 2881, 2886, 53 L.Ed.2d 1009 (1977). These three exceptions, embedded within the statute's text, permit injunctions against state court proceedings (1) where Congress expressly authorizes, (2) where necessary in aid of the court's jurisdiction, and (3) where necessary to protect or effectuate the court's judgments. *See* 28 U.S.C. § 2283.

Martingale and Bridge the Gap fit into none of the Act's exceptions. First, the parties do not assert, nor do we find, that Congress expressly authorizes injunctions against state courts in the Rivers and Harbors Act, 33 U.S.C. §§ 401 *et seq.*

Second, the injunction they seek is not necessary in aid of the court's jurisdiction. Courts have applied this second exception in only two scenarios: where the case is removed from the state court, and where the federal court acquires in rem or quasi in rem jurisdiction over a case involving real property before the state court does. *See, e.g.*, 17 Wright, Miller, & Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4225, at 528 (1988); Erwin Chemerinsky, *Federal Jurisdiction*, § 11.2.3, at 699-700 (3d ed.1999). Neither of these scenarios applies in this case.[3] Further, the existence of a federal right not to have

[3] Although this case does involve aspects of real property law, jurisdiction over these parties is based on in personam, rather than in rem, principles. Therefore, the "in aid of jurisdiction" exception does not apply. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (declining to apply the "necessary in aid of jurisdiction" exception where the federal and state actions were based on in personam jurisdiction, and noting that "[t]he traditional notion is that in personam actions in federal and state court may

(Continued on following page)

property taken without just compensation does not render equitable relief necessary in aid of the federal courts' jurisdiction. First of all, Martingale and Bridge the Gap have failed to show a violation of this right. Second, the Supreme Court has noted that "when a state proceeding presents a federal issue, even a pre-emptive issue, the proper course is to seek resolution of that issue by the state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988).

Finally, because there has been no prior federal court decision on the matter of the bridge, Martingale and Bridge the Gap cannot show that an injunction would be "necessary to promote or effectuate [the court's] judgments."

Martingale and Bridge the Gap's arguments against applying the Anti-Injunction Act are unavailing. They argue that the Anti-Injunction Act may bar their request for an injunction, but not their claim for declaratory relief. Martingale and Bridge the Gap's argument is clever, but unpersuasive. Their ultimate goal is to halt the state court condemnation proceedings, a result that

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proceed concurrently, without interference from either court, and there is no evidence that the exception to § 2283 was intended to alter this balance."); *see also In re Am. Honda Motor Co., Inc., Dealerships Relations Litig.*, 315 F.3d 417, 439 (4th Cir.2003) ("The 'necessary in aid of its jurisdiction' exception to the Anti-Injunction Act is widely understood to apply most often when a federal court was the first in obtaining jurisdiction over a *res* in an *in rem* action and the same federal court seeks to enjoin suits in state courts involving the same *res*."); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 806 (9th Cir.2002) (indicating that the most prominent form of the "in aid of jurisdiction" exception is for in rem actions); *In re Diet Drugs*, 282 F.3d 220, 234 (3d Cir.2002).

either an injunction or a declaratory judgment would accomplish equally well. Other parties have tried this ruse, and most courts that have addressed this issue have rejected their argument. *See, e.g., Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir.2000), *cert. denied* 530 U.S. 1274, 120 S.Ct. 2740, 147 L.Ed.2d 1005 (2000); *U.S. Steel Corp. Plan for Employee Ins. Benefits v. Musisko*, 885 F.2d 1170, 1175 (3d Cir.1989), *cert. denied*, 493 U.S. 1074, 110 S.Ct. 1121, 107 L.Ed.2d 1028 (1990); *Gloucester Marine Rys. Corp.*, 848 F.2d at 15; *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 498-99 (5th Cir.1988) (en banc), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989); *Bledsoe v. Fulton Bank*, 940 F.Supp. 804, 808 (E.D.Pa.1996). This Court follows the guidance of these courts and determines that where, as here, declaratory relief would have the same practical effect as an injunction, the Anti-Injunction Act precludes the court from granting a declaratory judgment.

Additionally, Martingale and Bridge the Gap argue that the Anti-Injunction Act does not prevent a court from enjoining the parties from *commencing* state court proceedings, as opposed to enjoining the parties from *proceeding with* already-filed state actions. They are correct. However, this is of no moment to the instant case because the City filed its condemnation action in July 2001. Because the condemnation action has been pending since that time, the Anti-Injunction Act prohibits any federal court from granting the declaratory or injunctive relief that Martingale and Bridge the Gap seek. In other words, an injunction issued anytime after July 2001 would not prevent the parties from commencing state court litigation; it would stop the parties from proceeding with

existing state court litigation, which is exactly what the Anti-Injunction Act prohibits.

The Court finds support for this analysis in its own precedent. In *Roth v. Bank of the Commonwealth,* 583 F.2d 527 (6th Cir.1978), state court litigation commenced after the federal suit was filed. The district court relied on a Seventh Circuit precedent to grant an injunction.

This Court reversed, concluding,

> we are led inevitably to the conviction that the logic of [the Seventh Circuit's opinion in] *Barancik* [*v. Investors Funding Corp.*, 489 F.2d 933 (7th Cir.1973)] (which in effect says that state proceedings which are commenced in fact are not commenced in law if commenced after the time the judicial power of the federal court was invoked) amounts to precisely that type of judicial improvisation which the Supreme Court has warned us to avoid.

Id. at 534. Therefore, the fact that the City did not file the state court lawsuit until after Bridge the Gap and Martingale filed suit in the federal district court has no bearing on the applicability of the Anti-Injunction Act. For these reasons, we conclude that the Anti-Injunction Act applies and that the district court lacked the power to grant Martingale and Bridge the Gap's requested injunctive and declaratory relief.

The injunctive and declaratory relief sought by Martingale and Bridge the Gap is clearly the heart of this case. Yet, included in the prayer for relief in plaintiffs' "Complaint for Declaration of Rights and Injunctive Relief" is a request for compensatory damages and attorneys' fees. A brief mention of monetary injury "in the form of lost

business opportunities and attorneys fees" is included elsewhere in the complaint. The complaint alleges no further facts in support of this relief and fails to allege any claim or theory of recovery for which plaintiffs seek compensatory damages or attorneys' fees.[4] The complaint fails to allege a claim for intentional interference with prospective contractual relations under Kentucky law. *See Nat'l Collegiate Athletic Ass'n v. Hornung,* 754 S.W.2d 855, 858-59 (Ky.1988) (requiring allegations of an improper motive, consisting of malice or some wrongful conduct on behalf of defendant). Likewise, the complaint fails to allege a claim for a Takings Clause violation. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (requiring an allegation of a deprivation of due process or a denial of fair compensation). Because this stray request for monetary relief is not accompanied by any alleged claim on which the relief could be based, our determination that the Anti-Injunction Act bars declaratory and injunctive relief concludes the case. It is unnecessary for us to reach the issues on which the district court based its decision.

We therefore AFFIRM the district court's decision to grant summary judgment in favor of the City of Louisville and the Waterfront Development Corporation.

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[4] Moreover, the appellate briefs do not mention compensatory damages or attorney's fees.

125 S.Ct. 453

Supreme Court of the United States

MARTINGALE, LLC, petitioner,

v.

CITY OF LOUISVILLE, KENTUCKY, et al.

No. 04-60.

Nov. 1, 2004.

Case below, 361 F.3d 297.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

125 S.Ct. 453, 160 L.Ed.2d 317, 73 USLW 3076, 73 USLW 3268, 73 USLW 3272

Dec. 17, 1872.

CHAP. IV. – *An Act to authorize the construction of Bridges across the Ohio River, and to prescribe the Dimensions of the same.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any persons or corporations, having lawful authority therefor, may hereafter erect bridges across the Ohio river, for railroad or other uses, upon compliance with the provisions and requirements of this act.

SEC. 2. That every bridge hereafter erected across the Ohio river, above the mouth of the Big Sandy, shall have at least one span of a height of not less than ninety feet above low water, and of not less than forty feet above local highest water, measured to the bottom chord of the bridge; that every bridge hereafter erected across the Ohio river below the mouth of the Big Sandy, shall have at least one span of a height of not less than one hundred feet above low water and of not less than forty feet above highest water, measured to the bottom chord of the bridge; that this high span shall give a clear opening of at least four hundred feet between the piers, measured at right angles to the current at every stage, and that it shall be placed over the main channel of the river used by boats during ordinary stages of water: *Provided, however*, That any one company, lawfully authorized by the States of West Virginia and Ohio, is hereby authorized to construct a bridge across the Ohio river, from the city of Wheeling, in the State of West Virginia, to the opposite side of said river within the State of Ohio, with a span over the main channel of not less than three hundred and fifty feet in length, and in all other respects conformable and subject to the provisions of this act, so far as the same are applicable to

bridges about the mouth of the Big Sandy: *And provided*, That in case this high span is not over the low-water channel, suitable arrangements be made elsewhere to permit the passage of single boats under the bridge at low water; that all bridges over the Ohio river, below the Covington and Cincinnati suspension bridge, shall have, in addition to the high span prescribed above, a pivot-draw, giving two clear openings of one hundred and sixty feet each, measured at right angles to the current at the average stage of water in the river, and located in a part of the bridge that can be safely and conveniently reached at that stage; and that said draw shall be opened promptly, upon reasonable signal, for the passage of boats, whose construction shall not be such as to admit of their passage under the stationary spans of said bridge, except when trains are passing over the same; but in no case shall unnecessary delay occur in opening the said draw before or after the passage of trains.

SEC. 3. That the piers of the high span and the piers of the draw shall be built parallel with the current at that stage of the river which is most important for navigation; and that no ripraps or other outside protection for imperfect foundations will be permitted in the channel-way of the high span, or of the draw openings.

SEC. 4. That any person, company, or corporation authorized to construct a bridge across the Ohio river shall give notice, by publication for one week in newspapers having a wide circulation, in not less than two newspapers in the cities of Pittsburg, Cincinnati, and Louisville, for bridges, above the mouth of the Big Sandy, and in the cities of Pittsburg, Cincinnati, Louisville, Saint Louis, Memphis, and New Orleans, for bridges below the mouth of the Big Sandy, and shall submit to the Secretary of

War, for his examination, a design and drawings of the bridge and piers, and a map of the location, giving, for the space of at least one mile above and one mile below the proposed location, the topography of the banks of the river, the shore-lines at high and low water, the direction of the current at all stages, and the soundings accurately showing the bed of the stream, the location of any other bridge or bridges, and shall furnish such other information as may be required for a full and satisfactory understanding of the subject by the Secretary of War; and if the Secretary of War is satisfied that the provisions of the law have been complied with in regard to location, the building of the piers may be at once commenced; but if it shall appear that the conditions prescribed by this act cannot be complied with at the location where it is desired to construct the bridge, the Secretary of War shall, after considering any remonstrances filed against the building of said bridge, and furnishing copies of such remonstrances to the board of engineers provided for in this act, detail a board composed of three experienced officers of the corps of engineers, to examine the case, and may, on their recommendation, authorize such modifications in the requirements of this act, as to location and piers, as will permit the construction of the bridge; not, however diminishing the width of the spans contemplated by this act: *Provided*, That the free navigation of the river be not materially injured thereby.

SEC. 5. That all parties owning, occupying, or operating bridges over the Ohio river shall maintain, at their own expense, from sunset to sunrise throughout the year, such lights on their bridges as may be required by the light-house board for the security of navigation; and all persons owning, occupying, or operating any bridge over

the Ohio river shall, in any event, maintain all lights on their bridge that may be necessary for the security of navigation.

Sec. 6. That any bridge constructed under this act, and according to its limitations, shall be a lawful structure, and shall be recognized and known as a post-route, upon which, also, no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States then the rate per mile paid for the transportation over the railroads or public highways leading to said bridge; and the United States shall have the right of way for postal-telegraph purposes across any such bridge; and in case of any litigation arising from any obstruction or alleged obstruction to the navigation of said river, created by the construction of any bridge under this act, the cause or question arising may be tried before the district court of the United States of any State in which any portion of said obstruction or bridge touches.

SEC. 7. That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the future construction of bridges, is hereby expressly reserved, without any liability of the government for damages on account of the alteration or amendment of this act, or on account of the prevention or requiring the removal of any such obstructions; and if any change be made in the plan of construction of any bridge constructed under this act, during the progress of the work thereon or before the completion of such bridges, such change shall be subject to the approval of the Secretary of War, and any change in the construction, or any alteration of any such bridge that may be directed at any

time by Congress, shall be made at the cost and expense of the owners thereof.

SEC. 8. That joint resolution number ten, approved April seventh, eighteen hundred and sixty-nine, authorizing the construction of a bridge over the Ohio river at Paducah, be, and the same hereby is, repealed.

SEC. 9. That the provisions of an act entitled "An act to provide for the better security of life on vessels propelled in while or in part by steam," &c., approved February twenty-eighth, eighteen hundred and seventy-one, so far as they relate to the limitation of steam pressure of steamboats used exclusively for towing and carrying freight on the Mississippi river and its tributaries, are hereby so far modified as to substitute for such boats one hundred and fifty pounds of steam pressure in place of one hundred and ten pounds, as provided in said act for the standard pressure upon standard boilers of forty-two inches diameter, and of plates of one-quarter of an inch in thickness; and such boats may, on the written permit of the supervising inspector of the district in which such boats shall carry on their business for a period of twelve mouths from and after the passage of this act, be permitted to carry steam above the standard pressure of one hundred and ten pounds, but not exceeding the standard pressure of one hundred and fifty pounds to the square inch.

APPROVED, December 17, 1872.

ACTS

OF THE

GENERAL ASSEMBLY

OF THE

COMMONWEALTH OF KENTUCKY,

PASSED AT THE

REGULAR. SESSION OF THE GENERAL ASSEMBLY,
WHICH WAS BEGUN AND HELD IN THE CITY OF FRANKFORT,
ON FRIDAY, THE THIRTIETH DAY OF DECEMBER,
EIGHTEEN HUNDRED AND EIGHTY-SEVEN

VOLUME 1.

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* * *

CHAPTER 2:2.

AN ACT to incorporate the Louisville and Jeffersonville Bridge Company.

Be it enacted by the General Assembly of the Commonwealth, of Kentucky:

§ 1. That John F. Read, Jonas G. Howard, John C. Zulanf, Dennis Long, David Franz, Jr., Joseph Huffaker, J. W. Baird, Edward Fulton, William F. Taffel, and their associates, successors and assigns, be, and they are hereby, created a body-corporate and politic, under the name of the Louisville and Jeffersonville Bridge Company; and as such shall have perpetual succession, may have and use a common seal, and alter the same at pleasure, and may enact such by-laws for its government as it may deem proper, provided the same be not inconsistent with the laws of the United States or of this State. It may also

exact and receive surety from any of its officers or employes for the faithful performance of their duties, and shall have and enjoy all corporate powers, privileges and franchises necessary or proper to enable them to carry out and execute the purposes herein after designated.

§ 2. The said company shall have right and power to construct, maintain and operate a bridge for the passage of cars and vehicles, propelled wholly or in part by steam, animal or other power, and for horsemen, pedestrians and live stock, over and across the Ohio river, from a point east of Preston street within the limits of the city of Louisville, in the State of Kentucky, on the south shore or bank of said river, to a point opposite thereto, within the corporate limits of the city of Jeffersonville, in the State of Indiana, and to charge, demand and receive tolls for the use thereof.

§ 3. Said company, after the selection of the site of said bridge, shall have the right, with the consent of the general council, to cross such streets and alleys as may be necessary to fully carry out the purposes of this act, and shall have power to acquire, by condemnation or purchase, for right of way in fee-simple over or in any or all lands necessary to be acquired by it in order to construct, complete, and operate the said bridge and approaches thereto, and to make connection with any railroad now or hereafter to be constructed within the city of Louisville. The land necessary to be acquired by condemnation shall be condemned in the manner and under the proceedings provided for the condemnation of land for railroad purposes, as prescribed by the general laws of this State applicable to such proceedings. Application for such proceedings may be made in the Jefferson county court, the Jefferson court of common pleas, or the law and equity court.

§ 4. The said company may issue capital stock to an amount not exceeding one million five hundred thousand dollars, divided into shares of one hundred dollars each, and may issue mortgage bonds to an amount not exceeding one million dollars, payable at such time as it may deem proper, and bearing interest at not exceeding six per centum per annum, payable semi-annually, and may make the principal and interest thereof payable at any place designated in the said bonds, and may secure the payment of such bonds and interest by a mortgage upon all the property, franchises, rights, and privileges of said company; the directors of said company may issue and deliver so much of the stock and bonds aforesaid, at par, as they may by contract agree in payment for rights of way, land, material furnished, work and labor done, in the building of the bridge aforesaid, or in carrying on the business of said company.

§ 5. The affairs of said company shall be conducted by a board of not less than five or more than nine directors, as the stockholders may from time to time provide, who shall be elected annually, at such time and place as may be provided by the by-laws of the company; but the corporators herein named shall act as a board of directors until an election shall be held: *Provided*, Such election shall be so held one year after the organization to be had after the passage of this act, and until their successors are elected and qualified; and the board of directors shall annually elect a president, vice-president, secretary and treasurer, and such other officers as they may, from time to time, deem necessary for the proper management of the business of the company. The president and vice-president shall be elected from the directors, and the offices of secretary and treasurer may be held by one person; all

vacancies occurring in the board may be filled by the remaining directors.

§ 6. The tolls charged by said company shall be such as may be fixed by the directors, from time to time: *Provided, however*, That the aggregate tolls charged by said company shall not be more than is sufficient to pay the expenses incident to maintaining, renewing and operating the said bridge and its appurtenances, the payment of taxes, interest on its bonded indebtedness, and provide a sinking fund for the payment of its bonds at maturity, and a semi-annual dividend of not exceeding eight per centum per annum on its capital stock.

§ 7. Shares of stock in said company shall be deemed personal property, and exempt from taxation; the bridge structure proper shall be taxed for State and other purposes, in the same manner and at the same rate as real estate; but the real and personal estate of said company, independent of the bridge structure proper, shall be taxed for State and city purposes, in the same way and at the same rate, as other property of the same kind is taxed.

§ 8. The said company, may if it deems proper, operate its own engines and cars or vehicles, on and over said bridge, its approaches and connecting lines, or it may by contract provide for the operation of the same by any other company.

§ 9. The said company shall have the right and power to unite or consolidate with any other bridge company having authority under any act of the Legislature, or organized under chapter 56 of the General Statutes, for the same purpose as herein granted, upon such terms as may be mutually agreed, but not to consolidate with any bridge already built; and when so united, the said consolidated

company shall have and enjoy all rights and privileges either of said corporations may have been entitled to under their respective charters.

§ 10. Said bridge company shall begin work within two years and complete the same within five years.

§ 11. This act shall take effect from and after its passage.

Approved February 20, 1888

[SEAL]

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, LOUISVILLE
CORPS OF ENGINEERS
P.O. BOX 59
LOUISVILLE, KENTUCKY 40201-0059

July 10, 1990

Operations and Readiness Division
Regulatory Branch (South)

Ms. Louisa Henson
Bridge the Gap, Incorporated
800 South Fourth Street
Louisville, Kentucky 40203

Dear Ms. Henson:

This is in response to your application and plans dated June 15, 1990, requesting authorization for the existing Big Four Railroad Bridge located east of Clay Street in Kentucky and spanning the Ohio River to Riverside Drive and Mulberry Street in Indiana. This bridge is located at Ohio River Mile 602.9.

Your application indicates that construction on this bridge began in the fall of 1889 and was completed on August 18, 1895. As you are aware, the U.S. Coast Guard does not consider the existing Big Four Railroad Bridge to be a "regulated bridge." Our review indicates that it can be considered an authorized structure completed prior to the Rivers and Harbors Act of 1899. As such, no Section 10 permit will be required for this structure as it currently exists.

Any modification to the structure, including new construction on the bridge structure or construction of new

approaches, will require authorization from either the Corps of Engineers or the Coast Guard depending on the nature of the modification. If modifications are anticipated, we suggest that you contact us to determine which agency will have jurisdiction.

A copy of this letter is being sent to Commanding Officer, Bridge Branch, Second Coast Guard District, 1430 Olive Street, St. Louis, Missouri 63103-2398.

If we can be of any further assistance, please contact us by writing to the above address, ATTN: CEORL-OR-FS, or by calling Mr. Kanzinger at (502) 582-5452.

Sincerely,

/s/ Don Purvis
Don Purvis
Chief, Regulatory Branch

SERVICE DATE
MAY 1, 1969

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington, D. C., on the 23rd day of April, 1969.

Finance Docket No. 25321

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO. AND PENN CENTRAL CO. ABANDONMENT BETWEEN JEFFERSONVILLE, IND., AND LOUISVILLE, KY.

Finance Docket No. 25354

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO. AND PENN CENTRAL CO. ABANDONMENT BETWEEN WESTPORT AND NORTH VERNON, IND.

Upon consideration of the applications filed by The Cleveland, Cincinnati, Chicago, and St. Louis Railway Company (Big Four) and Penn Central Company (Penn Central), lessee, both carriers by railroad, under section 1(18) of the Interstate Commerce Act for permission to abandon portions of the line of railroad of the Big Four, and abandonment of operations thereover by Penn Central, (1) in Finance Docket No. 25321 from Milepost 0.0 in Jeffersonville, Ind. to Milepost 2.0 in Louisville, Ky., a distance of approximately 2.0 miles; and over the entire line from approximately Milepost 1.7 on the aforedescribed line to the connection with the Louisville and Nashville Railroad at Milepost 2.6 aggregate distance of approximately 2.9 miles in Clark County, Ind., and Jefferson County, Ky., and (2) in Finance Docket No. 25354 that portion of the North Vernon Branch extending between Chaining Milepost 236.4 at Westport and Chaining Milepost 248.8 at North

Vernon, a distance of approximately 12.4 miles in Decatur and Jennings County, Ind; and of protests to said applications by Railway Labor Executives' Association in the ground that the applications, if approved, may have an adverse effect in railway employees; and

It appearing, That the interest of employees will be protected by the imposition of appropriate conditions; that operations are no longer needed over these lines as service is furnished over alternate facilities of applicant; that no users will be adversely affected by the abandonments; that substantial savings will result to applicants upon abandonments; and that the continued maintenance and operation of the lines would impose an undue and unnecessary burden on applicant and upon interstate commerce;

It is hereby certified, That, subject to the same conditions for the protection of employees as set forth in *Chicago, B. & Q. R. Co. Abandonment*, 257 I.C.C. 700, the present and future public convenience and necessity permit the abandonment by The Cleveland, Cincinnati, Chicago and St. Louis Railway Company and the abandonment of operations by Penn Central Company, of the lines of railroad described above;

It is ordered, That this certificate and order shall take effect and be in force from and after 35 days from the date of its service; and that tariffs applicable to the lines herein permitted to be abandoned may be canceled upon notice to this Commission and to the general public by not less than 10 days filing and posting in the manner presecribed [sic] in section 6 of the Interstate Commerce Act;

It is further ordered, That, when filing schedules canceling tariffs applicable to said lines, the applicants

shall, in such schedules, refer to this certificate and order by date and docket number;

It is further ordered, That, if the authority herein granted is exercised, applicants shall submit for the consideration of this Commission two copies of the journal entries showing the retirement of the lines from service, and confirm in writing to this Commission, immediately after abandonment, the dates on which the abandonments have actually taken palce [sic]; and

It is further ordered, That if the authority granted in this certificate and order is not exercised within one year from its effective date, it shall be of no further force or effect.

By the Commission, Review Board Number 5.

H. NEIL CARSON,
Secretary.

(SEAL)